

EDMUND G. BROWN JR., Attorney General  
of the State of California  
RICHARD D. MARINO, State Bar No. 90471  
Deputy Attorney General  
ELAINE GYURKO  
Senior Legal Analyst  
California Department of Justice  
300 South Spring Street, Suite 1702  
Los Angeles, California 90013  
Telephone: (213) 897-4944  
Facsimile: (213) 897-9395

Attorneys for Complainant

**BEFORE THE  
RESPIRATORY CARE BOARD  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA**

In the Matter of the Accusation and Petition to  
Revoke Probation Against:

Case No. R-2057

DAMIEN MARK HERRERA  
541 N. Osborn  
West Covina, California 91790

**ACCUSATION AND  
PETITION TO REVOKE  
PROBATION**

Respiratory Care Practitioner License No. 20799

Respondent.

Complainant alleges:

PARTIES

1. Stephanie Nunez (Complainant) brings this Accusation and Petition to Revoke Probation solely in her official capacity as the Executive Officer of the Respiratory Care Board of California (Board), Department of Consumer Affairs.

2. On or about May 13, 1999, the Board issued Respiratory Care Practitioner License No. 20799 to Damien Mark Herrera (Respondent). This license was in effect at all times relevant to the charges brought herein and will expire on April 30, 2007, unless renewed.

3. In a disciplinary action entitled *In the Matter of the Accusation Against Damien Herrera*, Case No. R-1380, the Board issued a decision, effective November 17, 2000, in which Respondent's license was revoked. However, the revocation was stayed and Respondent's

1 license was placed on probation for three (3) years with certain terms and conditions. A copy of  
2 that decision is attached as Exhibit A and is incorporated herein by reference. In a disciplinary  
3 action entitled *In the Matter of the Accusation Against Damien Mark Herrera*, Case No. R-1960,  
4 the Board issued a decision, effective July 18, 2005, in which Respondent's license was revoked.  
5 However, the revocation was stayed and Respondent's license was placed on probation for three  
6 (3) years with certain terms and conditions. A copy of that decision is attached as Exhibit B and  
7 is incorporated herein by reference.

#### 8 JURISDICTION

9 4. This Accusation and Petition to Revoke Probation is brought before the  
10 Board under the authority of the following laws. All section references are to the Business and  
11 Professions Code (Code) unless otherwise indicated.

12 5. Section 3710 of the Code states: "The Respiratory Care Board of  
13 California, hereafter referred to as the board, shall enforce and administer this chapter [Chapter  
14 8.3, the Respiratory Care Practice Act]."

15 6. Section 3718 of the Code states: "The board shall issue, deny, suspend,  
16 and revoke licenses to practice respiratory care as provided in this chapter."

17 7. Section 3754 of the Code states: "The board may deny an application for,  
18 or issue with terms and conditions, or suspend or revoke, or impose probationary conditions  
19 upon, a license in any decision made after a hearing, as provided in Section 3753."

20 8. Section 3750 of the Code states:

21 "The board may order the suspension or revocation of, or the imposition of  
22 probationary conditions upon, a license issued under this chapter, for any of the following  
23 causes:

24 "...

25 "(g) Conviction of a violation of any of the provisions of this chapter or of any  
26 provision of Division 2 (commencing with Section 500), or violating, or attempting to  
27 violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to  
28 violate any provision or term of this chapter or of any provision of Division 2

1 (commencing with Section 500).

2 “ . . .

3 “(j) The commission of any fraudulent, dishonest, or corrupt act which is  
4 substantially related to the qualifications, functions, or duties of a respiratory care  
5 practitioner. . . .”

6 9. Section 3750.5 of the Code states:

7 "In addition to any other grounds specified in this chapter, the board may deny,  
8 suspend, or revoke the license of any applicant or license holder who has done any of the  
9 following:

10 " . . .

11 "(b) Used any controlled substance as defined in Division 10 (commencing with  
12 Section 11000) of the Health and Safety Code. . . .”

### 13 COST RECOVERY

14 10. Section 3753.5, subdivision (a) of the Code states:

15 “In any order issued in resolution of a disciplinary proceeding before the board,  
16 the board or the administrative law judge may direct any practitioner or applicant found to have  
17 committed a violation or violations of law to pay to the board a sum not to exceed the costs of the  
18 investigation and prosecution of the case.”

19 11. Section 3753.7 of the Code states:

20 “For purposes of the Respiratory Care Practice Act, costs of prosecution shall  
21 include attorney general or other prosecuting attorney fees, expert witness fees, and other  
22 administrative, filing, and service fees.”

23 12. Section 3753.1, subdivision (a) of the Code states:

24 “An administrative disciplinary decision imposing terms of probation may  
25 include, among other things, a requirement that the licensee-probationer pay the monetary costs  
26 associated with monitoring the probation.”

27 //

28 //

1 FIRST CAUSE TO REVOKE PROBATION<sup>1</sup>

2 (Abstain from Use of Any and All Mood Altering Substances)

3 13. At all times after the effective date of Respondent's probation, Condition 3  
4 stated:

5 Respondent shall completely abstain from the possession or use of alcohol,  
6 controlled substances, dangerous drugs, and any and all other mood altering drugs,  
7 substances and their associated paraphernalia, except when the drugs are lawfully  
8 prescribed by a licensed practitioner as part of a documented medical treatment.

9 Respondent shall execute a release authorizing the release of pharmacy and  
10 prescribing records as well as physical and mental health records. Respondent shall also  
11 provide information of treating physicians, counselors or any other treating professionals  
12 as requested by the Board.

13 Respondent shall ensure that he is not in the presence of or in the same physical  
14 location as individuals who are using illegal substances, even if Respondent is not  
15 personally ingesting the drug(s).

16 Any positive result that registers over the established laboratory cutoff level shall  
17 constitute a violation of probation and shall result in the filing of an accusation and/or a  
18 petition to revoke probation against Respondent's respiratory care practitioner license.

19 Respondent also understands and agrees that any positive result that registers over  
20 the established laboratory cutoff level shall be reported to each of Respondent's  
21 employers.

22 14. Respondent's probation is subject to revocation because he failed to  
23 comply with Probation Condition 3, referenced above. The facts and circumstances regarding  
24 this violation are as follows:

25 On March 9, 2006, Respondent appeared at a collection site to provide a urine  
26 specimen for testing and analysis in accordance with his probation monitoring program. The  
27

---

28 1. Case No. R-1960

laboratory report from Compass Vision Inc. indicated he tested positive for Ethyl Glucuronide at 390 nanograms/milligrams.

On June 21, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 8.0 nanograms/milligrams.

On August 16, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Ethyl Glucuronide at 2700 nanograms/milligrams.

On September 19, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 12 nanograms/milligrams.

On November 20, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 21 nanograms/milligrams.

On December 27, 2006, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 11 nanograms/milligrams.

On January 11, 2007, Respondent provided a urine specimen for testing and analysis. The laboratory report indicated he tested positive for Cannabinoids at 39 nanograms/milligrams.

## SECOND CAUSE TO REVOKE PROBATION

### (Supervisor Quarterly Reports)

15. At all times after the effective date of Respondent's probation, Condition 5 stated:

Supervisor Quarterly Reports of Performance are due for each year of probation and the entire length of probation from each employer, as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th. For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and

1 July 7th. For the period covering July 1st through September 30th, reports are to be  
2 completed and submitted between October 1<sup>st</sup> and October 7th. For the period covering  
3 October 1st through December 31st, reports are to be completed and submitted between  
4 January 1st and January 7th. Respondent is ultimately responsible for ensuring his  
5 employer(s) submits complete and timely reports. Failure to ensure each employer  
6 submits complete and timely reports shall constitute a violation of probation.

7 16. Respondent's probation is subject to revocation because he failed to  
8 comply with Probation Condition 5 referenced above. The facts and circumstances regarding this  
9 violation are as follows:

10 Respondent failed to ensure that his employer submit a Supervisor Quarterly  
11 Report of performance for the period July 1 through September 30, 2006, which was due to the  
12 Board by October 7, 2006.

13 Respondent failed to ensure that his employer submit a Supervisor Quarterly  
14 Report of performance for the period October 1 through December 31, 2006, which was due to  
15 the Board by January 7, 2007.

16 THIRD CAUSE TO REVOKE PROBATION

17 (Obey All Laws)

18 17. At all times after the effective date of Respondent's probation, Condition 6  
19 stated:

20 Respondent shall obey all laws, whether federal, state, or local. Respondent shall  
21 also obey all regulations governing the practice of respiratory care in California.

22 Respondent shall notify the Board in writing within 14 days of any incident  
23 resulting in his arrest, or charges filed against, or a citation issued against Respondent.

24 18. Respondent's probation is subject to revocation because he failed to  
25 comply with Probation Condition 6, referenced above. The facts and circumstances regarding  
26 this violation are as follows:

27 Respondent violated section 3750.5, subdivision (b) of the Code in that he used  
28

1 the controlled substance Cannabinoids.<sup>2</sup> The facts and circumstances, set forth in Paragraph 14  
2 of this Accusation and Petition to Revoke Probation, are incorporated herein by reference.

3 On or about December 12, 2005, in a criminal proceeding entitled *People v.*  
4 *Damien Mark Herrera*, in Orange County Superior Court, Case Number 05NM11669,  
5 Respondent was convicted by a plea of guilty to failure to stop at the scene of an accident in  
6 which his vehicle was involved, a violation of Vehicle Code section 20002(a), and driving a  
7 motor vehicle with privilege suspended for driving under the influence of alcohol, a violation of  
8 Vehicle Code section 14601.2(a). He was placed on probation for three years with various terms  
9 and conditions.

#### 10 FOURTH CAUSE TO REVOKE PROBATION

##### 11 (Quarterly Reports)

12 19. At all times after the effective date of Respondent's probation, Condition 7  
13 stated:

14 Respondent shall file quarterly reports of compliance under penalty of perjury, on  
15 forms to be provided to the probation monitor assigned by the Board. Omission or  
16 falsification in any manner of any information on these reports shall constitute a violation  
17 of probation and shall result in the filing of an accusation and/or a petition to revoke  
18 probation against Respondent's respiratory care practitioner license.

19 Quarterly report forms will be provided by the Board. Respondent is responsible  
20 for contacting the Board to obtain additional forms if needed. Quarterly reports are due  
21 for each year of probation and the entire length of probation as follows:

22 For the period covering January 1<sup>st</sup> through March 31<sup>st</sup>, reports are to be  
23 completed and submitted between April 1<sup>st</sup> and April 7<sup>th</sup>. For the period covering April  
24 1<sup>st</sup> through June 30<sup>th</sup>, reports are to be completed and submitted between July 1<sup>st</sup> and July  
25 7<sup>th</sup>. For the period covering July 1<sup>st</sup> through September 30<sup>th</sup>, reports are to be completed

---

26  
27 2. Cannabinoids are mind-altering (psychoactive) drugs; they all contain THC (delta-9-  
28 tetrahydrocannabinol), the main active chemical in marijuana.

1 and submitted between October 1<sup>st</sup> and October 7<sup>th</sup>. For the period covering October 1<sup>st</sup>  
2 through December 31<sup>st</sup>, reports are to be completed and submitted between January 1<sup>st</sup>  
3 and January 7<sup>th</sup>.

4 Failure to submit complete and timely reports shall constitute a violation  
5 of probation.

6 20. Respondent's probation is subject to revocation because he failed to  
7 comply with Probation Condition 7 referenced above. The facts and circumstances regarding this  
8 violation are as follows:

9 Respondent failed to submit his Quarterly Report of Compliance for the period  
10 July 1 through September 30, 2006, which was due to the Board by October 7, 2006.

11 Respondent failed to submit his Quarterly Report of Compliance for the period  
12 October 1 through December 31, 2006, which was due to the Board by January 7, 2007.

13 FIRST CAUSE FOR DISCIPLINE

14 (Use of a Controlled Substance)

15 21. Respondent is subject to disciplinary action under section 3750.5,  
16 subdivision (b) of the Code, in that he used the controlled substance Cannabinoids. The facts  
17 and circumstances, set forth in Paragraph 14 of this Accusation and Petition to Revoke Probation,  
18 are substantially related to the qualifications, functions or duties of a respiratory care practitioner,  
19 and are incorporated herein by reference.

20 SECOND CAUSE FOR DISCIPLINE

21 (Commission of a Fraudulent, Dishonest, or Corrupt Act)

22 22. Respondent is subject to disciplinary action under section 3750,  
23 subdivision (j) of the Code in that he committed a fraudulent, dishonest or corrupt act  
24 substantially related to the qualifications, functions, or duties of a respiratory care practitioner.

25 On or about March 14, 2006, Respondent completed a Drug Questionnaire in  
26 which he answered "No" to question number 5, "In the last 3 months, have you consumed  
27 alcohol?" He signed the form under penalty of perjury that the information he reported was true  
28 and correct. Respondent failed to truthfully and correctly answer question number 5. The



1 laboratory report from Compass Vision Inc. indicated that the urine specimen he provided on  
2 March 9, 2006, tested positive for Ethyl Glucuronide at 390 nanograms/milligrams.

3 PRAYER

4 WHEREFORE, Complainant requests that a hearing be held on the matters herein  
5 alleged, and that following the hearing, the Respiratory Care Board issue a decision:

6 1. Revoking the probation that was granted by the Respiratory Care Board of  
7 California in Case No. R-1960;

8 2. Revoking or suspending Respiratory Care Practitioner License No. 20799  
9 issued to Damien Mark Herrera;

10 3. Ordering Damien Mark Herrera to pay the Respiratory Care Board the  
11 costs of the investigation and enforcement of this case, and if probation is continued or extended,  
12 the costs of probation monitoring; and

13 4. Taking such other and further action as deemed necessary and proper.

14  
15 DATED: February 21, 2007  
16  
17

18 Original signed by Liane Zimmerman for:  
19 STEPHANIE NUNEZ  
20 Executive Officer  
21 Respiratory Care Board of California  
22 Department of Consumer Affairs  
23 State of California  
24 Complainant  
25  
26  
27  
28